STATE OF MICHIGAN

COURT OF APPEALS

DELLITA JOHNSON, a/k/a DELITTA JOHNSON, a/k/a DELITA JOHNSON, as Next Friend of JEROME JOHNSON, JR., a Minor,

Plaintiff-Appellant,

v

CITY OF DETROIT and DETROIT HOUSING COMMISSION,

Defendants-Appellees.

UNPUBLISHED
October 24, 2006

No. 264125
Wayne Circuit Court
LC No. 04-421569-NO

DELITTA JOHNSON,

Plaintiff-Appellee,

v

CITY OF DETROIT,

Defendant-Appellant.

No. 264221
Wayne Circuit Court
LC No. 04-421569-NO

DELLITA JOHNSON, a/k/a DELITTA JOHNSON, a/k/a DELITA JOHNSON, as Next Friend of JEROME JOHNSON, JR., a Minor,

Plaintiff-Appellee,

v

CITY OF DETROIT and DETROIT HOUSING COMMISSION,

Defendants-Appellants.

No. 264232
Wayne Circuit Court
LC No. 04-421569-NO

Before: Saad, P.J., and Jansen and White, JJ.

PER CURIAM.

In these consolidated appeals, plaintiff, as next friend of minor Jerome Johnson, Jr. (the minor), and defendant city of Detroit (the City), each appeal by leave granted the trial court's order granting partial summary disposition in favor of the City.[1] We affirm in part, reverse in part, and remand for entry of judgment in favor of the City consistent with this opinion.

This case arises out of injuries allegedly sustained by the minor from exposure to lead-based paint while residing with plaintiff in the Jeffries public housing project between 1988 and 1992. During this time period, the City operated the Jeffries project under the terms and conditions of an annual contributions contract (ACC) executed between the City, acting through the DHC, and the United States Department of Housing and Urban Development (HUD).

In 1997, the building in which plaintiff and the minor had resided was demolished. Plaintiff, as the minor's next friend, filed suit against the City and the DHS in the United States District Court for the Eastern District of Michigan. The district court dismissed plaintiff's federal claims for failure to state a claim.[2] Plaintiff's supplemental state claims were also dismissed.

In July 2004, plaintiff filed the instant action against the City and the DHC, seeking monetary damages for the minor's alleged injuries. Plaintiff's complaint alleged a claim of negligence arising from a breach of common-law and statutory duties (Count I), a claim of breach of contract arising from an alleged breach of the ACC (Count II), and a claim of nuisance per se (Count III). The City and the DHC moved for summary disposition. The trial court granted summary disposition in favor of the DHC on the ground that it was not a proper party defendant to the action. The trial court granted the City's motion for summary disposition with respect to Count III based on governmental immunity.[3] The court found that Count I was barred by the failure to provide proper notice of the claim as required by MCL 125.663. The trial court denied the City's motion with respect to Count II, finding that the minor was a third-party beneficiary of the ACC executed between HUD and the City.

I. Docket No. 264221

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[1] Although the Detroit Housing Commission (DHC) is also a defendant, plaintiff does not challenge the trial court's dismissal of the DHC on the ground that the DHC was not a proper party. The court dismissed the DHC as a party defendant because it does not exist independently of the city of Detroit.

[2] The United States Court of Appeals for the Sixth Circuit recently affirmed the district court's dismissal of plaintiff's federal claims. *Johnson v Detroit*, 446 F3d 614, 617 (CA 6, 2006).

[3] Plaintiff has not appealed the dismissal of Count III of her complaint.

Plaintiff challenges the trial court's application of MCL 125.663 to Count I of her complaint. Having considered each of plaintiff's arguments, we find no basis for disturbing the trial court's decision regarding the applicability of MCL 125.663.

Plaintiff begins by arguing that the notice requirement in MCL 125.663 was tolled by the minority saving provision in MCL 600.5851. We disagree. We review this issue of statutory construction de novo. *Wilson v Alpena Co Rd Comm*, 474 Mich 161, 166; 713 NW2d 717 (2006). "When interpreting statutory language, we are to ascertain the legislative intent that may reasonably be inferred from the words expressed in the statute." *Id.*

MCL 125.663 is part of the housing facilities act (HFA), MCL 125.651 *et seq.* The HFA was enacted by 1933 (Ex Sess) PA 18, to ensure that the state of Michigan would be eligible for federal grants for the construction, improvement, or repair of low-cost housing and slum projects, and to acquire property in connection with such projects. *In re Brewster Street Housing Site*, 291 Mich 313, 322-324; 289 NW 493 (1939). At the time of the minor's alleged injuries, the HFA required sixty days' written notice of all claims arising out of injuries that occur in public housing projects:

> All claims that may arise in connection with said housing project or projects shall be presented as are ordinary claims against the city or village: Provided, That written notice of all claims based upon injury to persons or property must be served upon the city or village clerk within sixty days from the happening of the injury . . . . [Former MCL 125.663.]

Although MCL 125.663 was amended by 1996 PA 338, the amended statute continues to require sixty days' written notice. The amended statute provides in pertinent part that "[w]ritten notice of all claims based upon injury to persons or property shall be served upon the city or village clerk within 60 days from the happening of the injury." MCL 125.663.

The minority saving provision in MCL 600.5851 is part of the Revised Judicature Act. At the time of the minor's residency at the Jeffries project, MCL 600.5851(1) provided in pertinent part, "if the person first entitled to . . . bring *an action* is under 18 years of age . . . the person or those claiming under the person shall have 1 year after the disability is removed . . . to . . . bring the action although the period of limitations has run" (emphasis added). A 1993 amendment to MCL 600.5851(1), which changed the phrase "an action" to "an action under this act," has been construed as restricting the minority saving provision to statutes of limitation contained in the Revised Judicature Act itself. *Hatcher v State Farm Mut Automobile Ins Co*, 269 Mich App 596, 604; 712 NW2d 744 (2005); *Cameron v Auto Club Ins Ass'n*, 263 Mich App 95, 100; 687 NW2d 354 (2004), vacated in part 476 Mich 55 (2006). However, that amendment is immaterial in this case because we conclude that the statutory notice provision of MCL 125.663 is not a "period of limitations" in the first instance.

A statutory notice provision is not the same as a statute of limitations. See *American States Ins Co v Dep't of Treasury*, 220 Mich App 586, 599; 560 NW2d 644 (1996); see also *Dillon v Tamminga*, 64 Mich App 301, 303-304; 236 NW2d 716 (1975). Statutory notice provisions serve different purposes than periods of limitation:

> "Notice provisions have different objectives than statutes of limitation. Notice provisions are designed, inter alia, to provide time to investigate and appropriate funds for settlement purposes. Statutes of limitation are intended to prevent stale claims and to put an end to fear of litigation." [*Blackwell v Borstein*, 100 Mich App 550, 554-555; 299 NW2d 397 (1980), quoting *Davis v Farmers Ins Group*, 86 Mich App 45, 47; 272 NW2d 334 (1978).]

The provision at issue in this case specifies the following prerequisites for a claim against a municipality arising out of an injury in a public housing project: (1) written notice of the claim; (2) provided to the clerk of the municipality; (3) within sixty days. Former MCL 125.663. As noted, the 60-day provision of the current MCL 125.663 is functionally identical. Unlike a typical statute of limitations, this provision does not serve to limit or curtail the allotted time in which a potential litigant may bring his or her claim. Instead, the provision serves to require timely written notification that a claim may be filed against the municipality in question. Accordingly, the 60-day notification requirement of both the former and current MCL 125.663 is a notice provision—not a period of limitations.

It is axiomatic that we will enforce an unambiguous statute as written. *Macomb Co Prosecuting Attorney v Murphy*, 464 Mich 149, 158; 627 NW2d 247 (2001). Because the plain language of MCL 600.5851(1) indicates that the statute pertains only to "period[s] of limitations," and because MCL 125.663 is not a period of limitations, we hold that the minority saving provision in MCL 600.5851(1) does not apply to the notice provision of the former or current MCL 125.663.[4]

Turning to plaintiff's contention that the City received notice of plaintiff's claim within the 60-day period set forth by MCL 125.663, we find no basis for disturbing the trial court's grant of summary disposition for the City on this issue. We review de novo the trial court's grant of summary disposition. *Wilson, supra* at 166. Because the trial court considered evidence outside the pleadings when considering this issue, we review its decision under MCR 2.116(C)(10). A motion under MCR 2.116(C)(10) tests the factual support for a claim. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). We consider the affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the nonmoving party. *Maiden, supra* at 120. If the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. MCR 2.116(C)(10); *Maiden, supra* at 120.

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[4] Plaintiff contends that the 60-day notice provision in MCL 125.663 is unconstitutional because it contains a shorter notice period than that contained in the 120-day notice provision of the governmental-immunity public building exception, MCL 691.1406. However, plaintiff has failed to address this matter in her statement of questions presented as required by MCR 7.212(C)(5). *Busch v Holmes*, 256 Mich App 4, 12; 662 NW2d 64 (2003). Further, plaintiff has failed to establish that she presented this issue to the trial court. *Harbour v Correctional Medical Services, Inc*, 266 Mich App 452, 468; 702 NW2d 671 (2005). We decline to address this issue, which has not been properly presented or preserved.

As an initial matter, it is undisputed that plaintiff did not *strictly* comply with the statutory notice provision. Plaintiff's deposition indicates that the minor was diagnosed with lead poisoning during the first year in which he resided at the Jeffries project, that an unidentified inspector tested plaintiff's apartment and told her that it contained lead paint, and that plaintiff then contacted the building's management to report the lead paint. It is not clear whether plaintiff told anyone about the alleged presence of lead paint within sixty days of her discovery of the minor's injuries. It is clear, however, that plaintiff never submitted written notice of her claim to the Detroit city clerk. Indeed, plaintiff conceded that she never provided written notification of her potential claim or of the alleged presence of lead paint to anyone. Thus, even viewing the evidence in a light most favorable to plaintiff, there is no question of fact with respect to whether plaintiff strictly complied with the requirements of the former MCL 125.663.

Plaintiff argues that her failure to strictly comply with the MCL 125.663 notice provision should be overlooked because she *substantially* complied with the provision. In general, substantial compliance may be sufficient to satisfy a statutory notice provision. *Meredith v Melvindale*, 381 Mich 572, 579-580; 165 NW2d 7 (1969); *Mullas v Sec'y of State*, 32 Mich App 693, 697-698; 189 NW2d 141 (1971). "Although mandatory notice provisions cannot be ignored . . . substantial compliance is sufficient." *Livonia v Dep't of Social Services*, 423 Mich 466, 513; 378 NW2d 402 (1985) (citation omitted).

Contrary to plaintiff's argument, even when viewed in her favor, the evidence does not establish substantial compliance with the notice provision of the former MCL 125.663. At most, plaintiff orally notified the Jeffries project's management office of the alleged presence of lead paint. However, she did not submit notice of her claim to the Detroit city clerk, and admittedly never provided written notice to anyone. As such, plaintiff's actions can hardly be considered substantially compliant with the statutory requirements. Based on the evidence presented in this case, there is no question of fact regarding whether plaintiff substantially complied with the notice requirements of the former MCL 125.663 before bringing her claim.

Finally, we reject plaintiff's claim that the City was not prejudiced by her lack of compliance with the MCL 125.663 notice provision. Michigan courts have generally excused noncompliance with statutory notice provisions so long as the defendant is not prejudiced by the failure to provide notification. See *Brown v Manistee Co Rd Comm*, 452 Mich 354, 357; 550 NW2d 215 (1996); *Arnold v Dep't of Transportation*, 235 Mich App 341, 344 n 3; 597 NW2d 261 (1999). Notice provisions permit a governmental agent to be apprised of possible litigation and to investigate and gather evidence quickly to evaluate the claim. *Brown*, *supra* at 362; *Blohm v Emmet Co Bd of Co Rd Comm'rs*, 223 Mich App 383, 388; 565 NW2d 924 (1997). Prejudice refers to a matter that prevents a party from having a fair trial, or a matter which the party could not properly contest. *Id.* Because neither party challenges the trial court's determination that an actual prejudice standard applies with respect to MCL 125.663, we will

assume for purposes of our review that the general rule requiring prejudice applies to the notice provision of MCL 125.663.[5]

Here, plaintiff offered no evidence to rebut the City's claim that it had been prejudiced by her failure to provide sufficient notice. As noted above, the building in which plaintiff and the minor resided between 1988 and 1992 was razed in 1997. The lack of proper notice in this case therefore deprived the City of an opportunity to timely investigate the conditions present in plaintiff's building before it was torn down. Among other things, statutory notice provisions are designed to provide an opportunity to investigate claims and gather information. *Brown*, *supra* at 362. Plaintiff has presented no evidence that her noncompliance with the notice provision, which precluded such an opportunity, did not prejudice the City.

Plaintiff failed to establish a genuine issue of material fact with respect to whether she substantially complied with the notice provision of MCL 125.663. She similarly failed to establish a genuine issue of fact with respect to whether the City was prejudiced by her noncompliance. We affirm the trial court's grant of summary disposition in favor of the City on Count I of the complaint.

II. Docket No. 264232

In Docket No. 264232, the City challenges the trial court's denial of its motion for summary disposition with respect to Count II. The City argues that summary disposition was warranted on plaintiff's contract claim (1) because neither plaintiff nor the minor was an intended third-party beneficiary of the ACC, (2) because the City did not properly receive notice of the minor's alleged injury under MCL 125.663, and (3) because of the preexisting duty doctrine. We decline to address the City's arguments concerning third-party beneficiary status and the preexisting duty doctrine because we find its argument concerning lack of statutory notice dispositive of this issue.

The City argues, as it did below,[6] that the MCL 125.663 notice provision is not limited to tort claims, but rather applies to any claim for personal injury, including the contract-based claim raised in Count II of plaintiff's complaint. We agree. We review this issue of statutory construction de novo. *Wilson*, *supra* at 166.

The former version of MCL 125.663, by its own plain language, applied to "[a]ll claims." Similarly, the current version of MCL 125.663 refers to "all claims." "Unless defined in the statute, every word or phrase of a statute will be ascribed its plain and ordinary meaning."

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[5] We note that this rule excusing noncompliance in the absence of prejudice, although frequently repeated throughout the Michigan case law, appears inconsistent with our Supreme Court's mandate to enforce statutory language as written. See *Burton v Reed City Hospital Corp*, 471 Mich 745, 753; 691 NW2d 424 (2005).

[6] The trial court erroneously commented in its opinion and order that neither party had raised this issue below. To the contrary, the City raised this matter in its amended motion for summary disposition.

Robertson v DaimlerChrysler Corp, 465 Mich 732, 748; 641 NW2d 567 (2002); see also MCL 8.3a. The word "claim" is defined as "[t]he aggregate of operative facts giving rise to a right enforceable by a court," "[t]he assertion of an existing right; any right to payment or to an equitable remedy, even if contingent or provisional," and "[a] demand for money or property to which one asserts a right." *CAM Constr v Lake Edgewood Condo Ass'n*, 465 Mich 549, 554; 640 NW2d 256 (2002), quoting Black's Law Dictionary (7th ed). Accordingly, the word "claim" appears to encompass all legally enforceable rights of action, whether sounding in tort, contract, or otherwise. See also *Hawley v Saranac*, 157 Mich 70, 75; 121 NW 303 (1909) (statutory provision requiring notice of "claims for personal injury or otherwise" encompassed "all claims").

The notice provision of MCL 125.663 unambiguously applies to "all claims" for personal injury—including those sounding in contract. We have already upheld the trial court's application of MCL 125.663 to Count I of plaintiff's complaint. Plaintiff's Count II is based on the same injury and underlying facts as Count I. Therefore, based on the lack of proper statutory notice under MCL 125.663, and for the reasons stated above, we conclude that the City was entitled to summary disposition on plaintiff's Count II contract claim. MCR 2.116(C)(10). We direct the trial court on remand to enter judgment for the City on Count II of plaintiff's complaint.

III. Docket No. 264221

In Docket No. 264221,[7] the City contends, inter alia, that the breach of contract claim in Count II of plaintiff's complaint actually sounds in tort. However, given our conclusions above, we need not reach the merits of this argument.

In light of our resolution of this case, it is unnecessary for us to address the parties' arguments concerning the applicability of the governmental tort liability act, MCL 691.1401 *et seq.*, and the public-building exception of MCL 691.1406. We decline to address the other remaining issues raised by the parties as well.

Affirmed in part, reversed in part, and remanded for entry of judgment in favor of the City consistent with this opinion. We do not retain jurisdiction.

/s/ Henry William Saad
/s/ Kathleen Jansen

[7] We reject plaintiff's jurisdictional challenge to the City's appeal in Docket No. 264221. Although plaintiff asserts that this Court lacks jurisdiction to consider the City's appeal by right, this Court previously entered an order treating the City's claim of appeal as a delayed application for leave to appeal and granting the application. Unpublished order of the Court of Appeals, issued April 7, 2006 (Docket No. 264221).